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THE NON-DELEGATION DOCTRINE AND MASSACHUSETTS PUBLIC EMPLOYEE GRIEVANCE ARBITRATION

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COMMENT

THE NON-DELEGATION DOCTRINE AND MASSACHUSETTS PUBLIC EMPLOYEE GRIEVANCE ARBITRATION

I. INTRODUCTION

It is commonly said that private employers possess complete control over the operation of their businesses, thus retaining the inherent authority to delegate any or all of that magagerial power to an outside party.[1] Public employers, on the other hand, are limited in the extent to which they may delegate their managerial powers.[2] This limitation is believed to be necessary in order to protect public control over basic policy decisions.[3]

One context in which this delegation may take place is in the arbitration[4] of grievances[5] arising out of a collective bargaining

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1. Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329, 338 (1980).

2. *Id. See also* Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974). "The private employers prerogatives are his to share as he sees fit, but the citizen's right to participate in governmental decisions cannot be bargained away by any public official." *Id.* at 1193.

3. School Comm. v. Curry, 3 Mass. App. Ct. 151, 158, 325 N.E.2d 282, 287 (1975), *aff'd*, 369 Mass. 683, 343 N.E.2d 144 (1976).

> In Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), Justice Powell wrote:
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> Where a teachers' union, for example, acting pursuant to a state statute authorizing collective bargaining in the public sector, obtains the agreement of the school board that teachers residing outside the school district will not be hired, the provision in the bargaining agreement to that effect has the same force as if the school board had adopted it by promulgating a regulation. Indeed, the rule in Michigan is that where a municipal collective-bargaining agreement conflicts with an otherwise valid municipal ordinance, the ordinance must yield to the agreement.

Id. at 253 (Powell, J., concurring).

4. Arbitration is generally defined as the "reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award. . . ." BLACK'S LAW DICTIONARY 96 (rev. 5th ed. 1979).

5. Grievance arbitration is the resolution of a dispute arising between parties to an

agreement between public employees and their public employer.[6] To the extent that basic policy decisions are subsumed by the collective bargaining process and the subsequent enforcement of collective bargaining agreements through grievance arbitration, effective public control over government services is diminished.[7]

A conflict arguably exists, however, between the need to prevent the delegation of managerial powers and the statutory duty of public employers to bargain with their employees on the issues of wages, hours and other conditions of employment.[8] The conflict occurs because conditions of employment, which must be bargained, and managerial policy decisions, that ought not be delegated, are not separate and distinct areas as they often overlap.[9] Further, the public employer may be required to bargain over procedures to settle grievances that may culminate in binding arbitration[10] as a means of enforcing the collective bargaining agreement once reached. Thus, when an arbitrator is called in to enforce a collective bargaining agreement which involves both conditions of employment and a basic policy decision, a delegation of managerial powers takes place to the extent that the arbitrator's remedy removes the discretion of the

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existing collective bargaining agreement relating "either to the meaning or proper application of a particular provision with reference to a specific situation or an omitted case." Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 723 (1945).

Grievance arbitration should be distinguished from interest arbitration which is the process of resolving "disputes over the formulation of collective agreements or efforts to secure them. [It] arise[s] where there is no such agreement or where it is sought to change the terms of one. . . ." *Id.* Interest arbitration may alternatively be characterized as "impasse" or "major dispute" arbitration. Impasse or interest arbitration in the public sector in Massachusetts is governed by MASS. GEN. LAWS ANN. ch. 150E, § 9 (West 1982).

Grievance arbitration may be alternatively characterized as "rights," "minor" or "dispute" arbitration. DeWolf, *The Enforcement of the Labor Arbitration Agreement in the Public Sector—The New York Experience*, 39 ALB. L. REV. 393, 399-400 n.16 (1975). Grievance arbitration and not impasse arbitration is the subject of this comment.

6. This is not to say that delegation and, hence, a violation of the doctrine cannot take place without an arbitrator. *See, e.g.*, Commonwealth v. Staples, 191 Mass. 384, 386, 77 N.E. 712, 713 (1906) (board of health could not delegate its power to another board); Commonwealth v. Maletsky, 203 Mass. 241, 248, 89 N.E. 245, 248 (1909) (where city is entrusted by the legislature with the power to issue permits for rag storage, it may not redelegate that power to the fire chief).

7. School Comm. v. Curry, 3 Mass. App. Ct. 151, 158, 325 N.E.2d 282, 287 (1975), *aff'd*, 369 Mass. 683, 343 N.E.2d 144 (1976).

8. MASS. GEN. LAWS ANN. ch. 150E, § 6 (West 1982).

9. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 581, 295 A.2d 526, 534 (1972).

10. MASS. GEN. LAWS ANN. ch. 150E, § 8 (West 1982).

employer with regard to that decision.[11] A delegation has occurred because it is the arbitrator and not the public employer who has made that decision.

The Massachusetts Supreme Judicial Court has attempted to resolve this conflict through application of the non-delegation doctrine. The non-delegation doctrine prevents managerial prerogatives from being delegated to the arbitrator by narrowing the scope of remedies available to the grievance arbitrator.[12] In order to determine those circumstances in which the grievance arbitration agreement should be respected from those circumstances in which preventing an unlawful delegation requires the agreement to yield, the court has looked to the relationship between Massachusetts' public employee collective bargaining statute[13] and public employer em-

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11. *See, e.g.*, Doherty v. School Comm., 363 Mass. 885, 885, 297 N.E.2d 994, 995 (1973). *See infra* text accompanying notes 29-37.

12. The non-delegation doctrine may also prevent bargaining over the matter entirely. *See* Chief of Police v. Town of Dracut, 357 Mass. 492, 502, 258 N.E.2d 531, 537-38 (1970); School Comm. v. Boston Teachers Union, Local 66, 378 Mass. 65, 71-72, 389 N.E.2d 970, 974 (1979); Boston Teachers Union, Local 66 v. School Comm., 386 Mass. 197, 212, 434 N.E.2d 1258, 1267 (1982). *But see* School Comm. v. Labor Relations Comm'n, 388 Mass. 557, 563, 447 N.E.2d 1201, 1208 (1983) (school committee decision to achieve a reduction in force by layoff not protected by non-delegation doctrine; proper and mandatory subject of bargaining).

13. MASS. GEN. LAWS ANN. ch. 150E, § 6 (West 1982). Massachusetts public employees were first granted the statutory right to form and organize labor organizations and to present proposals "relative to salaries and other conditions of employment" collectively in 1958. Act of July 15, 1958, ch. 460, 1958 Mass. Acts 308, *repealed by*, Act of Nov. 26, 1973, ch. 1078, 1973 Mass. Acts 1124 (relevant sections were reenacted and codified as amended at MASS. GEN. LAWS ANN. ch. 150E, § 2 (West 1982)) (Chapter 150E retains the right to join and form labor unions and to bargain collectively on questions of salaries and other terms and conditions of employment. *See* MASS. GEN. LAWS ANN. ch. 150E, § 2 (West 1982)). Public employees were exempted from protection and regulation by the National Labor Relations Act, ch. 372, § 2(2), 49 Stat. 449, 450 (1935) (codified as amended at 29 U.S.C. § 152(2) (1976)). Massachusetts labor law also excluded public employees. Act of May 29, 1937, ch. 436, § 2(2), 1937 Mass. Acts 589, 590 (codified as amended at MASS. GEN. LAWS ANN. ch. 150A, § 2(2) (West 1982)). Thus, a large body of labor law was not applied to public employees. Grady, *Collective Bargaining and Public Employees*, 9 B.B.J. Jan. 1965, at 9, 9.

Two years later, the legislature granted authority to state and state subdivisions to enter collective bargaining agreements with its employees. Act of Aug. 1, 1960, ch. 561, 1960 Mass. Acts 488, *repealed by* Act of Nov. 17, 1965, ch. 763, § 1, 1965 Mass. Act. 551, 551 (under MASS. GEN. LAWS ANN. ch. 150E, §§ 1, 6 (1982), the authority is rephrased as a duty to negotiate). While it would seem to follow logically from a grant to public employees of a right to bargain collectively that public employers would have the power to enter agreements with such organizations, city and town solicitors argued that they had no power to enter such agreements. Segal, *1960 Labor Laws In Massachusetts*, 5 B.B.J. Jan. 1961, at 15, 17. The 1960 legislation, therefore, "clarifie[d] the present law as

powering statutes.[14] The public employee bargaining statute enumerates certain statutes which are subordinate to a collective bargaining agreement.[15] Missing from that exhaustive list are, among others, empowering statutes for police commissioners[16] and statutes

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a declaration of policy to permit cities and towns to enter into collective bargaining agreements . . . ." *Id.* at 17.

The legislative cycle was complete, Grady, *supra*, at 10, when the legislature imposed upon the state, Act of July 1, 1964, ch. 637, 1964 Mass. Acts 550, *repealed by* Act of Nov. 26, 1973, ch. 1078, 1973 Mass. Acts 1124 (relevant section reenacted and codified as amended at MASS. GEN. LAWS ANN. ch. 150E, §§ 1, 6 (West 1982)) (Chapter 150E retains duty to bargain with employee organizations, *see* MASS. GEN. LAWS ANN. ch. 150E, §§ 1 (defining "employer" as including the Commonwealth), 6 (imposing duty on public employer to negotiate) (West 1982)), and then the municipalities, Act of Nov. 17, 1965, ch. 763, § 2, 1965 Mass. Acts 555, *repealed by* Act of Nov. 26, 1973, ch. 1078, 1973 Mass. Acts 1124 (relevant section reenacted and codified as amended at MASS. GEN. LAWS ANN. ch. 150E, §§ 1, 6 (West 1982) (Chapter 150E retains the municipal employers' duty to bargain with employee organizations, *see* MASS. GEN. LAWS ANN. ch. 150E, §§ 1 (including municipal employer within the definition of "employer"), 6 (imposing duty on public employer to negotiate) (West 1982)), the duty to bargain with a duly recognized or certified bargaining representative. (A bargaining representative is recognized by a showing of 50% employee support or certified by an election held by the Labor Relations Commission. *See* MASS. GEN. LAWS ANN. ch. 150E, § 4 (West 1982)).

Grievance arbitration prior to 1973 was available only for municipal employees, and then only when the parties voluntarily agreed, Act of Nov. 17, 1965, ch. 763, § 2, 1965 Mass. Acts 555, 558, *as amended by* Act of June 16, 1970, ch. 445, 1970 Mass. Acts 273, Act of June 6, 1972, ch. 375, 1972 Mass. Acts 233 *repealed by* Act of Nov. 26, 1973, ch. 1078, § 1, 1973 Mass. Acts 1124. In 1973, the legislature permitted the state to agree to grievance arbitration, as well as the municipalities, and made significant changes pertaining to exclusivity of remedy and modes of enforcement of agreements to arbitrate grievances. MASS. GEN. LAWS ANN. ch. 150E, § 8 (West 1982). See generally Note, *Grievance Arbitration in the Public Sector: The New Massachusetts Law*, 9 SUFFOLK U.L. REV. 721 (1975) for a discussion of the changes the 1973 statute made in existing law.

In relation to the non-delegation doctrine, the Supreme Judicial Court has stated that there was no significant change between the pre-existing grievance arbitration statute, Act of Nov. 17, 1965, ch. 763, § 2, 1965 Mass. Acts 555, 558, *as amended by* Act of June 16, 1970, ch. 445, 1970 Mass. Acts 273, Act of June 6, 1972, ch. 375, 1972 Mass. Acts 233, *repealed by* Act of Nov. 26, 1973, ch. 1078, § 1, 1973 Mass. Acts 1124 and the new grievance arbitration statute, MASS. GEN. LAWS ANN. ch. 150E, § 8 (West 1982). School Comm. v. Raymond, 369 Mass. 686, 688, 343 N.E.2d 145, 147 (1976) (dictum). Because the court was dealing with a school committee and its application of the non-delegation doctrine, this does not signify a failure of the court to recognize the new statutes application to state employees or its changes in exclusivity of remedy or enforcement. *See* Note, *supra*, at 721.

14. *See infra* notes 15-18.

15. City of Boston v. Boston Police Superior Officers Fed'n, 9 Mass. App. Ct. 898, 899, 402 N.E.2d 1098, 1099 (1980). More than seventy separate statutes are enumerated as subordinate to a collective bargaining agreement. Some are statutory wage rates, *see, e.g.*, MASS. GEN. LAWS ANN. ch. 41, § 108D (West 1979) (minimum annual compensation), while others are public employer empowering statutes, *see, e.g.*, MASS. GEN. LAWS ANN. ch. 35, §§ 50-56 (West Supp. 1982).

16. Act of Apr. 14, 1906, ch. 291, 1906 Mass. Acts 253, *as amended by* Act of Apr.

establishing school committee managerial[17] and hiring powers.[18] Because these statutes are not subordinate to the collective bargaining agreement, the supreme judicial court has held that the non-delegation doctrine requires that conflicts between these agreements and the powers of police commissioners or school committees are to be resolved in favor of the public employer.[19]

Forming the foundation for the supreme judicial court's application of the non-delegation doctrine is an assumption that expansive use of grievance arbitration subsumes managerial prerogatives.[20] This comment will trace the development of the non-delegation doctrine in Massachusetts and describe the scope of its application. The doctrine's justification will then be examined in light of the policy and purposes of grievance arbitration. Finally, this comment will analyze the concern and assumptions of the supreme judicial court and will demonstrate that the court's concern may adequately be protected while allowing for a broader application of grievance arbitration agreements.

15, 1962, ch. 322, § 1, 1962 Mass. Acts 156. *See* City of Boston v. Boston Police Supervisor Officers Fed'n, 9 Mass. App. Ct. 898, 899, 402 N.E.2d 1098, 1099 (1980).

17. *See* School Comm. v. Korbut, 373 Mass. 788, 793 n.9, 369 N.E.2d 1148, 1152 n.9 (1977). MASS. GEN. LAWS ANN. ch. 71, § 37 (West 1971) provides: "[The school committee] shall have general charge of all the public schools and departments when not otherwise provided for. It may determine, subject to this chapter, the number of weeks and hours during which the schools shall be in session and may make regulations as to attendance therein."

18. MASS. GEN. LAWS ANN. ch. 71, § 38 (West 1971). The relevant portions state that the school committee "shall elect and contract with the teachers of the public schools, shall require full and satisfactory evidence of their moral character, and shall ascertain their qualifications for teaching and their capacity for the government of schools." *Id.*

19. City of Boston v. Boston Police Superior Officers Fed'n, 9 Mass. App. Ct. 898, 899, 402 N.E.2d 1098, 1099 (1980); Berkshire Hills Regional School Dist. Comm. v. Berkshire Educ. Ass'n, 375 Mass. 522, 526-27, 377 N.E.2d 940, 944 (1978).

Prior to enactment of MASS. GEN. LAWS ANN. ch. 150E, § 7 (West 1982) Massachusetts law provided that collective bargaining agreements were subordinate to "any law, ordinance or by-law." Act of Nov. 17, 1965, ch. 763, § 2, 1965 Mass. Acts 555, 557, *amended by* Act of Aug. 3, 1967, ch. 514, 1967 Mass. Acts 380, Act of Apr. 3, 1969, ch. 128, 1969 Mass. Acts 61, Act of May 22, 1969, ch. 341, 1969 Mass. Acts 174, Act of May 20, 1970, ch. 340, 1970 Mass. Acts 178, *repealed by* Act of Nov. 26, 1973, ch. 1078, § 1, 1973 Mass. Acts 1124. Because chapter 150E repealed these statutes it is arguable that a collective bargaining agreement in compliance with scope of bargaining as provided by MASS. GEN. LAWS ANN. ch. 150E, § 6 (West 1982), and not excepted by section 7 is no longer either subordinate nor superior to any conflicting law. *See* School Comm. v. Labor Relations Comm'n, 388 Mass. 557, 566, 447 N.E.2d 1201, 1208 (1983).

20. *See supra* note 3; *infra* text accompanying notes 29 & 37.

II. APPLICATION OF THE NON-DELEGATION DOCTRINE IN MASSACHUSETTS

Application of the non-delegation doctrine in Massachusetts has altered the grievance arbitration process in several respects. While managerial prerogatives cannot be subordinated to the collective bargaining agreement,[21] grievances which involve both managerial prerogatives and bargainable topics may be separated to allow for an arbitration award.[22] Typically such an award is limited to damages.[23] This damage award, however, may be required by the court to be limited in order to protect managerial prerogatives from delegation.[24] Nevertheless, the supreme judicial court has recognized certain areas to which the doctrine will not apply.[25]

A. *Separating Managerial Prerogatives from Wages, Hours and Conditions of Employment*

The supreme judicial court began its examination of the appropriate nexus between grievance arbitration and managerial prerogatives in *Doherty v. School Committee*.[26] In *Doherty*, an arbitrator reinstated a golf coach with back pay[27] after finding that he was fired for his union activities which was in violation of his contract with the school committee.[28] The court held that the power to appoint was a discretionary power reserved to the managerial prerogatives of the school committee and it set aside the reinstatement award on the grounds that the arbitrator superseded the committee's discretion.[29] Additionally, while the *Doherty* court set aside the reinstatement award, the arbitrator's award of money damages was allowed to

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21. *See supra* note 19 and accompanying text.
22. *See infra* text accompanying notes 38-42.
23. *See infra* text accompanying note 40.
24. *See infra* text accompanying notes 47-49.
25. *See infra* notes 52-64, 72-82 and accompanying text.
26. 363 Mass. 885, 297 N.E.2d 494 (1973).
27. *Id.* at 885, 297 N.E.2d at 495.
28. *See id.*
29. *Id.* To the extent that an arbitrator may not reinstate a teacher when the school committee's non-reappointment was based on union activities, the validity of *Doherty* is in doubt. In Blue Hills Regional School Dist. Comm. v. Flight, 1981 Mass. Adv. Sh. 1240, 421 N.E.2d 755 (1981), the court held that reappointment is an appropriate arbitration remedy when unlawful sex discrimination was the basis for the school committee's dismissal. *Id.* at 1242, 421 N.E.2d at 756. *See infra* notes 72-77 and accompanying text. Because firing for union activity is unlawful under MASS. GEN. LAWS ANN. ch. 150E, § 10(a)(4) (West 1982), reinstatement should be an appropriate arbitration remedy. *See also* Southern Worcester Regional Vocational School Dist. v. Labor Relations Comm'n, 386 Mass. 414, 436 N.E.2d 380 (1982); *infra* text accompanying notes 78-86.

stand[30] without explanation.[31]

The explanation absent in *Doherty* came three years later in *School Committee v. Raymond*.[32] Raymond was a director of music in the public schools. He was covered by a collective bargaining agreement which contained a grievance clause that provided for binding arbitration.[33] The school committee abolished Raymond's position, reduced his salary and demoted him.[34] Raymond's grievance went to binding arbitration and the arbitrator ordered reinstatement with back pay.[35] Upon review of an application to vacate the award,[36] the supreme judicial court found that the arbitrator could

30. 363 Mass. at 885, 297 N.E.2d at 495.

31. *See id.*

32. 369 Mass. 686, 343 N.E.2d 145 (1976).

33. *Id.* at 687, 343 N.E.2d at 147.

34. *Id.*

35. *Id.*

36. Awards may be vacated under MASS. GEN. LAWS ANN. ch. 150C, § 11 (West 1982). Section 11 lists several grounds upon which an award may be vacated. *Id.* When a party moves to vacate an arbitration award on delegation grounds, the appropriate claim is that under section 11(a)(3), "the arbitrators exceeded their powers. . . ." *Id.* § 11(a)(3). *See* School Comm. v. Agawam Educ. Ass'n, 371 Mass. 845, 847 n.4, 359 N.E.2d 956, 957-58 n.4 (1977).

MASS. GEN. LAWS ANN. ch. 150C, § 11(a)(5) (West 1982), states that "the fact that an award orders reinstatement of an employee with or without back pay . . . shall not be grounds for vacating . . . the award." *Id.* This provisio does not bar vacating an arbitrator's award on non-delegation grounds although the delegation may have occurred by the fact of reinstatement. *See* School Comm. v. Korbut, 4 Mass. App. Ct. 743, 745, 358 N.E.2d 831, 834, *vacated on other grounds*, 373 Mass. 788, 369 N.E.2d 1148 (1977).

Arbitration may be stayed before proceedings commence under MASS. GEN. LAWS ANN. ch. 150C, § 2(b) (West 1982). When a party seeks to stay arbitration on delegation grounds the appropriate claim is that the "claim sought to be arbitrated does not state a controversy covered by the provision for arbitration. . . ." MASS. GEN. LAWS ANN. ch. 150C, § 2(b)(2) (West 1982). Massachusetts has adopted the presumption of arbitrability which holds that arbitration will be allowed unless the controversy is clearly excluded from arbitration in the collective bargaining agreement. School Comm. v. Tyman, 372 Mass. 106, 113, 360 N.E.2d 877, 881 (1977). When the claim is premised on non-delegation grounds, however, a broad grievance arbitration provision cannot prevent a stay of arbitration although the controversy is not specifically excluded from the provision and would otherwise be arbitrable. This is so because the supreme judicial court has held that a dispute which cannot lawfully be arbitrated is equivalent to the absence of a controversy covered by the arbitration provision. Dennis-Yarmouth Regional School Comm. v. Dennis Teachers Ass'n, 372 Mass. 116, 119, 360 N.E.2d 883, 885 (1977). For further discussion of the presumption of arbitrability, see *infra* note 139.

A party to the completed arbitration process may apply to the court to modify or correct the award under MASS. GEN. LAWS ANN. ch. 150C, § 12 (West 1982). Modification generally entails only matters of form. *Id. See also* Pratt, Read & Co. v. United Furniture Workers, Local 105, 136 Conn. 205, 208, 70 A.2d 120, 122 (1949). While *Pratt* was decided on the basis of Connecticut statutes, both CONN. GEN. STAT. ANN. § 52-419 (West Supp. 1983) and MASS. GEN. LAWS ANN. ch. 150C, § 12 (West 1982) are modeled on the UNIF. ARBITRATION ACT § 13, 7 U.L.A. 68-69 (1956). Examination of how those

not reinstate Raymond because the decision to abolish a position was within the exclusive nondelegable powers of the school committee and the arbitrator could not reverse that decision.[37] At the same time, however, contracting against the loss of one's position and the reduction of one's pay is within legitimate employee concerns over wages, hours and conditions of employment.[38] The court therefore held that the arbitrator was free to remedy this breach without impinging upon the school committee's managerial prerogatives,[39] and that an award of pay without reinstatement did not so infringe upon those prerogatives as to make the contract unenforceable.[40] Thus, *Raymond* demonstrates that a matter which involves managerial prerogatives may also involve matters constituting hours, wages or other conditions of employment.[41] If the two matters are separable and the arbitrator can fashion a remedy that protects the legitimate interests of the employee without infringing on managerial prerogatives, then arbitration may appropriately be allowed.[42]

B. *Limitation on the Compensation Award*

While an arbitrator may award back pay as a remedy for the

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statutes have been construed in other jurisdictions, therefore, may be a fruitful means of determining their meaning. *See* School Comm. v. Agawam Educ. Ass'n, 371 Mass. 845, 848, 359 N.E.2d 956, 958 (1977). When arbitration awards are separated by the court, allowing compensation awards to stand while vacating the unlawful reinstatement, *see infra* text accompanying notes 38-52, the awards are "modified" under section 12(a)(2) which states: "[t]he arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted." MASS. GEN. LAWS ANN. ch. 150C, § 12(a)(2) (West 1982). *See Raymond*, 369 Mass. at 691, 343 N.E.2d at 149.

An arbitration award will be confirmed upon application of any party if, within ten days, there have been no applications to modify, correct or vacate the award or if the application to vacate is denied. MASS. GEN. LAWS ANN. ch. 150C, §§ 10, 11(d), 8 (West 1982).

Judicial review of an arbitration award is limited in scope. The function of the court is limited to ascertaining whether the party seeking arbitration has stated a claim which, on its face, is governed by the terms of the contract, United Steelworkers of Am. v. American Mfg., 363 U.S. 564, 567-68 (1960), or the other narrow grounds provided by chapter 150C, City of Lawrence v. Falzarano, 1980 Mass. Adv. Sh. 571, 581, 402 N.E.2d 1017, 1024 (1980). Provided the arbitrators do not exceed the scope of issues submitted to them, they are empowered to make errors of law or fact without judicial correction. Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp. Auth., 363 Mass. 386, 390, 294 N.E.2d 340, 343 (1973).

37. *See Raymond*, 369 Mass. at 690, 343 N.E.2d at 148.
38. *Id.*
39. *Id.* at 691, 343 N.E.2d at 149.
40. *Id.*
41. *See supra* note 9 and accompanying text.
42. *See supra* notes 37-40 and accompanying text.

contract breach, an arbitration award may be tantamount to an unlawful appointment[43] when the duration of the award is unlimited. Thus, to protect managerial prerogatives from delegation, the arbitration award may be subject to limitation.

In *School Committee v. New Bedford Educators Association*,[44] an arbitrator awarded an unsuccessful applicant for a guidance counselor position, the difference in pay between her position as a teacher and the position for which she applied until the appointment was made.[45] The court, while recognizing that the arbitrator could award compensation as a remedy, vacated the indefinite pay differential award.[46] The court noted that the school committee would have no real alternative but to capitulate and make the appointment if the payments continued indefinitely.[47] "While the school committee must be encouraged [to honor its contract] and the grievant's injury should be redressed, an arbitration award cannot, in the guise of compensation, accomplish indirectly what a direct order may not do. It cannot 'supersede the discretion legislatively vested' in the school committee."[48] Thus, an award must be limited so as not to force a committee to capitulate and make the appointment.[49]

C. *Reinstatement May Be Ordered in Some Circumstances*

There are two general circumstances in which reinstatement may be ordered: 1) where reinstatement would allow the school committee to follow contractual procedures rather than being based upon a contractual entitlement; and 2) where reinstatement remedies a practice of unlawful discrimination.

1. Contractual Procedures

In *School Committee v. Korbut*,[50] the supreme judicial court addressed the question of whether the reinstatement remedy might not offend the non-delegation doctrine in certain circumstances. In so doing *Korbut* modified the *Raymond* rule that an arbitrator may never reinstate a teacher.[51] In *Korbut*, a language arts coordinator

43. *See supra* text accompanying notes 34-37.
44. 9 Mass. App. Ct. 793, 405 N.E.2d 162 (1980).
45. *Id.* at 794, 405 N.E.2d at 163.
46. *Id.* at 802, 405 N.E.2d at 168.
47. *Id.*
48. *Id.*
49. *Id.* at 803, 405 N.E.2d at 168.
50. 373 Mass. 788, 369 N.E.2d 1148 (1977).
51. 369 Mass. at 690, 434 N.E.2d at 148. *See supra* text accompanying note 37.

was not reappointed due to allegedly unsatisfactory performance.[52] Korbut grieved claiming that the school committee failed to follow its contractually required notice and hearing procedures.[53] The arbitrator agreed and ordered Korbut's reinstatement.[54] On appeal from an order vacating[55] the award, the supreme judicial court reversed.[56] The court allowed reinstatement as an appropriate remedy because, in this instance, the reinstatement did not impair the school committee's ultimate power to discharge Korbut, but only provided the school committee with additional time to follow the agreed upon procedures.[57] After such procedures were followed, Korbut could then be freely terminated by the committee[58] without recourse.

Reinstatement has also been held to be an appropriate remedy where contractual procedures have not been followed and the school committee has not indicated that the claimant was disqualified. Reinstatement may be ordered even though the power not to reappoint will be impaired. In *Bradley v. School Committee*,[59] the school committee failed to follow the agreed procedures in transferring incumbent principals to vacancies occurring in principalships in other schools.[60] The agreed procedure left the opportunity for the school committee to deny the request for transfer.[61] At the point in which the arbitrator ordered the school committee to follow the procedure, however, the award was tantamount to ordering the school committee to approve the transfer requests.[62] The supreme judicial court affirmed the superior court's confirmation[63] of the award.[64]

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52. 373 Mass. at 790, 369 N.E.2d at 1150.

53. *Id.* at 790-91, 369 N.E.2d at 1150.

54. *Id.* at 791, 369 N.E.2d at 1150.

55. *Id.*; *see supra* note 36.

56. 373 Mass. at 793, 369 N.E.2d at 1151.

57. *Id.* at 796-97, 369 N.E.2d at 1153-54.

58. *Id.* at 798, 369 N.E.2d at 1154. The court assumed that allowing arbitration with regard to procedures provided some measure of protection to the employee. One commentator, in discussing this procedure protection argument noted that "this right to arbitrate may be illusory. Even if the procedures were violated what remedy is available? The arbitrator can require the procedures to be followed but the board still makes the determination of tenure decisions!" Vaccaro, *Significance of Recent Decisions on Grievance Arbitrability in Public Sector Labor Relations*, 8 J. OF L. & EDUC. 379, 384 n.9 (1979).

59. 373 Mass. 53, 364 N.E.2d 1229 (1977).

60. *Id.* at 54-55, 364 N.E.2d at 1231.

61. *Id.* at 54, 364 N.E.2d at 1231.

62. *Id.* at 59, 364 N.E.2d at 1234.

63. Arbitration awards are confirmed under MASS. GEN. LAWS ANN. ch. 150C, § 10 (West 1982). *See supra* note 36.

64. 373 Mass. at 60, 364 N.E.2d at 1234.

The *Bradley* court's approach represents a radical departure from the existing non-delegation theory. While the court had previously held that collective bargaining agreements must be subordinate to managerial prerogatives,[65] the *Bradley* court applied a balancing test.[66] The court stated: "[w]e must decide whether the issues of educational policy which are implicated in the criteria for filling vacant principalships so outweigh the similarly implicated issues of employment conditions that the committee cannot make even voluntary agreements on this subject."[67] The court found that the procedures for filling vacant principalships "lacked the prerogative quality" to prevent confirmation of the arbitrator's award.[68] The procedure lacked prerogative quality because it did not eliminate the committee's right to disapprove transfer requests.[69] In this case, because the committee did not disapprove of the qualifications of the incumbents, this was tantamount to the school committee's approval.[70] Thus, the court found that no improper delegation had occurred even if the arbitrator's award had been tantamount to an appointment.[71]

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65. *See supra* text accompanying notes 15-19.

66. 373 Mass. at 57-58, 364 N.E.2d at 1233. The balancing test was ignored only one year later in Berkshire Hills Regional School Dist. Comm. v. Berkshire Educ. Ass'n, 375 Mass. 522, 377 N.E.2d 940 (1978), in which the court held that the school committee had no power to bargain away managerial power because the empowering statutes, MASS. GEN. LAWS ANN. ch. 71, §§ 37, 38 (West 1971), were not subordinate to collective bargaining agreements. *Berkshire Educ. Ass'n*, 375 Mass. at 527-28, 377 N.E.2d at 943-44; MASS. GEN. LAWS ANN. ch. 150E, § 7 (West 1982); *see supra* note 19. In City of Boston v. Boston Police Superior Officers Fed'n, 9 Mass. App. Ct. 809, 402 N.E.2d 1098 (1980), the balancing test was again not applied in the context of police bargaining. Because the police commissioners empowering statute, Act of Apr. 14, 1906, ch. 291, 1906 Mass. Acts 253, *as amended by* Act of Apr. 15, 1962, ch. 323, 1962 Mass. Acts 156, is not made subordinate to collective bargaining agreements by MASS. GEN. LAWS ANN. ch. 150E, § 7 (West 1982), the power of the commissioner must necessarily prevail. *Boston Police*, 9 Mass. App. Ct. at 762, 402 N.E.2d at 1099.

The balancing test re-emerged, however, in Boston Teachers Union, Local 66 v. School Comm., 386 Mass. 197, 434 N.E.2d 1258 (1982). In *Boston Teachers*, the court balanced the interests of the school committee in protecting its managerial prerogatives to determine class size for one fiscal year with employee interests in job security. *Id.* at 213, 434 N.E.2d 1267-68. The job security clause was enforceable in part because of the diminished managerial interest after the budget had been accepted. *Id.* Thus, because of the courts vacillation as to use of the balancing test, the extent to which claims of employee interest may overcome the implicated managerial prerogatives is unclear.

67. *Bradley*, 373 Mass. at 57-58, 364 N.E.2d at 1233 (citation omitted).

68. *Id.* at 58, 364 N.E.2d at 1233.

69. *Id.*

70. *See id.* at 60, 364 N.E.2d at 1234.

71. *See id.*

2. Unlawful Discrimination

The second circumstance in which an arbitrator may make an appointment as part of the arbitration award is where the school committee's appointment decision was based upon unlawful discrimination. For example, if the school committee engages in unlawful sex discrimination, the arbitrator may order the committee to make the unlawfully refused promotion. In *Blue Hills Regional District School Committee v. Flight*,[72] the arbitrator found a contract violation in the school committee's discrimination against a teacher on the basis of her sex.[73] The court allowed reinstatement to stand explicitly as an exception to the non-delegation doctrine.[74] In *Flight* there was no finding of implied approval of the teacher's qualifications[75] and the award did not provide the school committee with the opportunity to evaluate the teacher.[76] Thus, an award of promotion clearly was a delegation to the arbitrator of the school committee's power to make promotions.[77]

Unlawful discrimination based upon union activity also may form the basis for an exception to the general rule that a school committee's appointment power may not be delegated to a third person. Unlawful discrimination may be remedied by appointment, even in those circumstances where the remedy will amount to granting tenure to the aggrieved teacher and deprive the school committee of its inherent managerial power.

In *Southern Worcester County Regional Vocational School Dis-*

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72. 1981 Mass. Adv. Sh. 1240, 421 N.E.2d 755 (1981).

73. *Id.* at 1240, 421 N.E.2d at 756.

74. *Id.* at 1242, 421 N.E.2d at 756.

75. *See id.* at 1240-43, 421 N.E.2d at 755-57.

76. *Id.*

77. *Id.* at 1242, 421 N.E.2d at 756. *Compare* Berkshire Hills Regional School Dist. Comm. v. Berkshire Educ. Ass'n, 375 Mass. 522, 377 N.E.2d 940 (1978) (appointment to principalship a non-delegable prerogative) *with* Bradley v. School Comm., 373 Mass. 53, 364 N.E.2d 1229 (1977) (principal may be appointed where procedures were violated and there was an implied approval of candidate's qualifications). For a more detailed discussion see *supra* notes 56-67 and accompanying text. The choice of principals then, is a non-delegable managerial prerogative. Appointment by the arbitrator, however, may be allowed where, either the school committee has not disqualified the candidate, *Flight*, 1981 Mass. Adv. Sh. at 1240-43, 421 N.E.2d at 755-57, or where the procedures ordered to be followed by the arbitrator will merely allow the school committee better opportunity to evaluate the candidate without impeding the ultimate choice by the committee to appoint or not to appoint. *See supra* note 48 and accompanying text. In *Flight*, by contrast, the arbitration award did impede the school committee's ultimate discretion whether or not to retain the aggrieved teacher. Blue Hills Regional Dist. School Comm. v. Flight, 10 Mass. App. Ct. 459, 468, 409 N.E.2d 226, 232-33 (1980), *rev'd on other grounds*, 1981 Mass. Adv. Sh. 1240, 421 N.E.2d 755 (1981).

trict v. Labor Relations Commission,[78] the Labor Relations Commission[79] ordered reinstatement as a remedy for antiunion discrimination.[80] The order effectively granted tenure.[81] Rather than announcing an additional exception to the non-delegation doctrine, the court held that the doctrine did not apply.[82] The court reasoned that, insofar as failing to reappoint a teacher for union activity was unlawful,[83] there was no managerial prerogative to do so.[84] The court did not reject the notion that delegation of the school board's power to grant tenure against its will was unlawful.[85] Rather, it found that if reinstatement could not be ordered, "unlawful antiunion discrimination in tenure decisions would never be subject to redress.[86]

As the foregoing discussion demonstrates, the non-delegation doctrine has evolved extensively from the original *Doherty* approach, which might have been interpreted as disallowing binding grievance arbitration altogether when the issue involved non-delegable managerial prerogatives. In *Raymond*, a bifurcated approach was adopted allowing the arbitrator to award compensation to the aggrieved teacher in order to protect the teacher's legitimate concerns over wages, hours and other conditions of employment without impeding the school committee's non-delegable managerial preroga-

78. 386 Mass. 414, 436 N.E.2d 380 (1982).

79. Under MASS. GEN. LAWS ANN. ch. 150E, § 11 (West 1982), the Labor Relations Commission is empowered to investigate prohibited practices under MASS. GEN. LAWS ANN. ch. 150E, § 10 (West 1982). If the commission determines that a prohibited practice has been committed it may require the party responsible to cease and desist the prohibited practice and take "such further affirmative action as will comply with the provisions of [the] section. . . ." MASS. GEN. LAWS ANN. ch. 150E, § 11 (West 1982).

The commission found that the school committee had violated MASS. GEN. LAWS ANN. ch. 150E, § 10(a)(1) and (3) (West 1982). *Southern Worcester*, 386 Mass. at 417, 436 N.E.2d at 383. Section 10(a)(1) makes it a prohibited practice for an employer to "[i]nterfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter. . . ." MASS. GEN. LAWS ANN. ch. 150E, § 10(a)(1) (West 1982). While not stated in the *Southern Worcester* opinion, because the teachers were denied reappointment for union activity, the right interfered with was probably their chapter 150E, § 2 right to join or assist employee organizations. MASS. GEN. LAWS ANN. ch. 150E, § 2 (West 1982). Section 10(a)(3) makes it a prohibited practice to "[d]iscriminate in regard to hiring, tenure, or any other term or condition of employment to encourage or discourage membership in any employee organization. . . ." MASS. GEN. LAWS ANN. ch. 150E, § 10 (West 1982).

80. *Southern Worcester*, 386 Mass. at 417, 436 N.E.2d at 383.

81. *Id.* at 423, 436 N.E.2d at 385.

82. *Id.* at 423, 436 N.E.2d at 386. *See supra* note 29.

83. *See supra* note 79.

84. *Southern Worcester*, 386 Mass. at 423, 436 N.E.2d at 386.

85. *Id.*

86. *Id.*

tives involved in the same issue.[87] The *Raymond* court assumed that reinstatement power would be beyond the arbitrator's powers in any case.[88] The *Korbut* court, however, put the reinstatement power into the arbitrator's remedial arsenal, but only if the school committee would not be deprived of making the ultimate appointment choice.[89] *Bradley* further expanded the *Korbut* rule by allowing reinstatement by the arbitrator in cases where, although the actual award would deprive the school committee of its ultimate appointment power, the contractual procedure breached by the school committee would not have deprived the committee of that power if the procedure had properly been followed.[90] Moreover, the *Southern Worcester* court found reinstatement to be a proper remedy in cases of unlawful discrimination without regard to whether the school committee was deprived of non-delegable powers.[91]

While the supreme judicial court has recognized the statutory right of employees to bargain for an entitlement to a position, it still will not tolerate an abrogation of the employer's inviolate managerial prerogative to freely discharge, demote, or fail to appoint an employee[92] even if doing so contravenes the collective bargaining agreement.[93] Where reinstatement will impede the employer's prerogative, the arbitration remedy will be limited to compensation and

87. 369 Mass. at 690-91, 343 N.E.2d at 148-49; *see supra* text accompanying notes 32-40.

88. *See* 369 Mass. at 691, 343 N.E.2d at 149.

89. 373 Mass. at 796-97, 369 N.E.2d at 1153-54; *see supra* text accompanying notes 50-58.

90. *See supra* text accompanying notes 67-71.

91. *Southern Worcester*, 386 Mass. at 423, 436 N.E.2d at 386; *see supra* text accompanying notes 78-86.

92. Provided of course that the decision is not motivated by unlawful discrimination. *See supra* text accompanying notes 72-77.

93. *Compare* Berkshire Hills Regional School Dist. Comm. v. Berkshire Hills Educ. Ass'n, 375 Mass. 522, 377 N.E.2d 940 (1978) (appointment as a remedy prohibited in arbitration to enforce contractual procedures for initial principalship appointments) *with* Bradley v. School Comm., 373 Mass. 53, 364 N.E.2d 1229 (1977) (appointment remedy available to arbitrator to enforce procedures for filling vacant principal positions with incumbent principals). In *Berkshire Hills* the agreement precluded employer discretion not to make the appointment. 375 Mass. at 526-27, 377 N.E.2d at 943. In *Bradley* it did not. 373 Mass. at 60, 364 N.E.2d at 1234. See also School Comm. v. Curry, 3 Mass. App. 151, 325 N.E.2d 282 (1975), *aff'd*, 369 Mass. 638, 343 N.E.2d 144 (1976), in which reinstatement was held not to be an appropriate remedy for the school committee's act of abolishing a supervisory position in contravention of the collective bargaining agreement because the action was deemed to be a matter of educational policy and therefor under the managerial control of the school committee. *Id.* at 157, 325 N.E.2d at 286-87. In Mt. Greylock Faculty Ass'n v. Mt. Greylock Regional School Comm., No. 1139-1857-80, slip op. (American Arbitration Ass'n May 22, 1981) (Hogan, Arb.), the arbitrator found a seniority agreement to be non-arbitrable because the seniority procedures deprived the

reinstatement will not be allowed.[94] An issue not addressed by the court, however, is whether grievance arbitration without a reinstatement remedy comports with the policies and purposes of grievance arbitration. In view of the recognized effectiveness of reinstatement as a remedy, this issue demands closer examination.

III. ANALYSIS

A. *The Non-Delegation Doctrine and its Effect on Adequate Contract Enforcement: Restricting the Reinstatement Remedy*

A collective bargaining agreement provides the basis for the ongoing relationship between the employer and its organized employees.[95] Unfortunately, the collective bargaining agreement is unable to address all of the various circumstances in which a dispute may arise; therefore, breakdowns in the ongoing relationship between employer and employees are inevitable.[96]

Historically, the primary means of resolving disputes in the private sector was the strike.[97] As an appropriate corollary to an agreement not to strike, the grievance arbitration procedure became favored as a matter of national labor policy in the private sector.[98] As damaging as strikes are in the private sector, striking in the public sector damages not only the parties involved but it is also very costly to the public.[99] In Massachusetts, where public sector striking is prohibited by statute,[100] the need for effective grievance arbitration is particularly acute in order to protect the integrity of the collective bargaining agreement and the working relationship between public employer and employees.[101] The non-delegation doctrine, however,

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committee of its discretion to decide which teachers "*must go*." *Id.* at 17 (emphasis in original).

94. *See Raymond*, 369 Mass. at 690, 343 N.E.2d at 148.

95. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

96. *Id.* at 580-81.

97. Board of Educ. v. Philadelphia Fed'n of Teachers, Local No. 3, 464 Pa. 92, 100, 346 A.2d 35, 39 (1975).

98. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

99. Board of Educ. v. Philadelphia Fed'n of Teachers, Local No. 3, 464 Pa. 92, 100, 346 A.2d 35, 39 (1975).

100. MASS. GEN. LAWS ANN. ch. 150E, § 9A (West 1982).

101. Note, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129, 136-38 (1968).

prevents effective use of grievance arbitration because it limits the availability of the reinstatement remedy to the grievance arbitrator.

The ineffectiveness of fashioning a remedy without reinstatement was recognized by the supreme judicial court in *Southern Worcester County Regional Vocational School District v. Labor Relations Commission*.[102] *Southern Worcester* did not involve grievance arbitration, but rather the Labor Relations Commission's[103] effort to remedy unlawful school district firings for union activity.[104] The Labor Relations Commission ordered reinstatement of the aggrieved employees as a remedy.[105] The school district contended that the reinstatement remedy violated the non-delegation doctrine because reinstatement would result in tenure, thus depriving the district of its power to make tenure decisions.[106] The court rejected this opportunity to bar reinstatement by holding that the non-delegation doctrine did not apply.[107]

Reinstatement in *Southern Worcester*, however, did divest the school committee of its power to make tenure decisions.[108] The granting of tenure is a power vested exclusively in a school committee and may not be delegated.[109] To avoid the argument that this action violated the non-delegation doctrine, the court held that the power of the school committee to make appointment decisions had been limited by the legislature and did not include the power to base decisions upon union activity.[110] It is unquestionably true that the school committee lacks the power to base its decisions on a prospective appointee's union activity.[111] It does not follow, however, that to divest the school committee of this power necessarily implies that reinstatement must be a remedy for the school committee's breach in this regard. Rather, it would be more appropriate, in light of the non-delegation doctrine, to limit the remedy available to the wronged employees to compensation,[112] which would not be tantamount to an indirect appointment.[113] This approach would compen-

102. 386 Mass. 414, 436 N.E.2d 380 (1982).
103. *See supra* note 79.
104. 386 Mass. at 417, 436 N.E.2d at 383.
105. *Id.*
106. *Id.* at 423, 436 N.E.2d at 386.
107. *Id.* at 423-24, 436 N.E.2d at 386.
108. *Id.* at 421, 436 N.E.2d at 385.
109. School Comm. v. Tyman, 372 Mass. 106, 113, 360 N.E.2d 877, 881 (1977).
110. *Southern Worcester*, 386 Mass. at 423, 436 N.E.2d at 386.
111. *See* MASS. GEN. LAWS ANN. ch. 150E, § 10(a)(3) (West 1982).
112. *See supra* text accompanying notes 34-39.
113. *See supra* text accompanying notes 43-49.

sate the aggrieved employees while still respecting the inviolate power of the school committee to make academic appointments.[114] In rejecting this approach, the *Southern Worcester* court recognized that without the reinstatement remedy, the statutory right not to be fired for union activity would be illusory.[115] The court stated that if reinstatement were not allowed, "unlawful antiunion discrimination in tenure decisions would never be subject to redress. This is a result we decline to reach."[116]

Southern Worcester demonstrates that reinstatement as a remedy for unlawful union activity is permissible, although the remedy deprives the school committee of its non-delegable powers. This result, however, has been reached only in grievance arbitration involving unlawful discrimination. In other contexts, the remedy of the arbitrator must be fashioned carefully so as not to infringe upon non-delegable powers. This may require the arbitrator to forego reinstatement although it may be the only appropriate remedy under the circumstances.

School Committee v. New Bedford Educators Association[117] is a grievance arbitration case in which reinstatement by the arbitrator was disallowed. In *New Bedford*, an arbitrator found that an applicant had been wrongfully denied an appointment to a guidance counselor position because the school committee had breached its contract.[118] The contract required that the school committee formulate its own qualification standards and abide by them in making the appointment.[119] The court found that the arbitrator could not have the power to appoint the aggrieved teacher to the denied position as a contract breach remedy,[120] because to do so would delegate the school committee's power, to choose guidance counselors, to the arbitrator.[121] The arbitrator was allowed to award money damages[122] provided the damages were not tantamount to an indirect appointment.[123]

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114. *See Raymond*, 369 Mass. at 690-91, 343 N.E.2d at 148-49.

115. *Southern Worcester*, 386 Mass. at 423-24, 436 N.E.2d at 386.

116. *Id.* *See also* Grady, *The Interface of Arbitration and the Law*, 18 B.B.J. June, 1974, at 29. To the extent that public employees are permitted to negotiate grievance arbitration agreements but reinstatement is barred as a remedy "[t]he public employee . . . wins a Pyrrhic victory, one of form but not of substance." *Id.* at 33.

117. 9 Mass. App. Ct. 793, 405 N.E.2d 162 (1980).

118. *Id.* at 797, 405 N.E.2d at 165.

119. *Id.* at 795, 405 N.E.2d at 164.

120. *Id.* at 798, 405 N.E.2d at 165.

121. *Id.* at 802, 405 N.E.2d at 168.

122. *Id.* at 802-03, 405 N.E.2d at 168.

123. *Id.* at 803, 405 N.E.2d at 168; *see also supra* text accompanying notes 43-49.

It would have been consistent with *Southern Worcester* to find that, without reinstatement as a remedy, the contract provisions in *New Bedford* would have been unenforceable and thus not subject to redress.[124] To attempt to harmonize the results in *Southern Worcester* and other non-delegation cases embodying the principles set forth in *New Bedford*,[125] the court noted that in *New Bedford* the agreement to follow a prescribed method of appointing guidance counselors was voluntary, while in *Southern Worcester* the duty not to fire for union activity was statutory.[126] Thus, a voluntary agreement to adhere to committee-chosen qualification standards is an infringement upon managerial prerogatives when remedied by appointment.[127] But when the limitation on school committee prerogatives is statutory, a grievance may be remedied by reinstatement by an arbitrator, although no independent statutory authorization exists for the reinstatement remedy.[128]

B. *Negotiating the Grievance Arbitration Agreement as an Exercise of Managerial Prerogatives*

Not all jurisdictions have agreed that voluntary agreements by a

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124. *Cf. Southern Worcester*, 386 Mass. at 423-24, 436 N.E.2d at 386.

125. *See id.* at 423, 436 N.E.2d at 386. The court was not comparing *New Bedford Educators* and *Southern Worcester*, but rather School Comm. v. Tyman, 372 Mass. 106, 360 N.E.2d 877 (1977), another non-delegation case. *New Bedford* is being used generally here as a non-delegation case to describe the court's reasoning. The principles are the same.

126. *Southern Worcester*, 386 Mass. at 424, 436 N.E.2d at 381.

127. *Id.*

128. *See Flight*, 1981 Mass. Adv. Sh. at 1242, 421 N.E.2d at 756. While MASS. GEN. LAWS ANN. ch. 150E, § 11 (West 1982), authorizes the Labor Relations Commission to reinstate an employee as a remedy for unfair employer practices, this does not explain why the supreme judicial court will allow reinstatement by an arbitrator as a remedy for grievances involving unlawful discrimination but not when the grievance involves a contractual breach. No statutory authority exists for the grievance arbitrator, as opposed to the Labor Relations Commission, to reinstate an employee to remedy unlawful discrimination, and such reinstatement amounts to a delegation of otherwise inviolate managerial powers. *See supra* text accompanying notes 74-77.

It may be argued that this disparity between authorized remedies is justified as a matter of policy—the need for heightened protection of teachers from unlawful discrimination. *See Southern Worcester*, 386 Mass. at 423-24, 436 N.E.2d at 386. This argument assumes that there is more reason, as a matter of policy, to protect teachers from unlawful discrimination than to protect the integrity of the collective bargaining agreement. Such a view is inconsistent with the elaborate protections afforded teachers by the legislature in organizing teacher unions, MASS. GEN. LAWS ANN. ch. 150E, §§ 1, 10, 11 (West 1982), and in negotiating collective bargaining agreements. *Id.* §§ 6, 10, 11. If the Labor Relations Commission is authorized to reinstate teachers to protect their organizational rights, such protection is meaningless if effective enforcement of the collective bargaining, the fruits of public teacher unionism, is denied. *See supra* note 116.

school committee to limit its discretion to make unilateral managerial decisions over certain issues constitutes an infringement on managerial discretion, and therefore, an unlawful delegation. The Supreme Court of Ohio in *Dayton Classroom Teachers Association v. Dayton Board of Education*[129] stated:

> [N]either reason nor authority prohibits a board of education from manifesting its policy decision in written form and calling the writing an agreement or contract. It cannot seriously be argued that entering into such an agreement is a departure from, or surrender of independent exercise of the boards policy-making power.[130]

Further, the court held that there was no infringement of those prerogatives by enforcing the contract through grievance arbitration.[131]

In Massachusetts, as in Ohio, the collective bargaining agreement is voluntarily entered and represents an independent exercise of a board's policy-making power. The agreement is voluntary because there is no compulsion to include any particular clause or issue into a collective bargaining agreement. Under Massachusetts public employee collective bargaining statues,[132] a public employer is bound to "negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other term and conditions of employment, but such obligation shall not compel either party to agree to a proposal or to make a concession."[133] Should an impasse result, no contract is forced upon the school committee or the union unless the parties mutually agree to binding impasse arbitration.[134] Moreover, because public employees cannot strike in Massachusetts,[135] they cannot impose specific demands on the public employer which it would not otherwise be inclined to accept.

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129. 141 Ohio St.2d 127, 323 N.E.2d 714 (1975).

130. *Id.* at 134, 323 N.E.2d at 718. In *Dayton* the Teachers Association brought proceedings to compel the board to honor its arbitration agreement in respect to a number of grievances including a claim that a substitute teacher was not placed on salary pursuant to the agreement. *Id.* at 123, 323 N.E.2d at 715. The lower courts found that the agreement to go to binding arbitration an unlawful delegation of the board's management powers. *Id.* at 129, 323 N.E.2d at 716. The Supreme Court of Ohio held that it was not. *Id.* at 134, 323 N.E.2d at 718.

Particularly relevant to this discussion is that in *Dayton* the court did not differentiate between the other grievances and the one involving the appointment of a substitute. The court allowed the grievance to go to arbitration. *Id.* at 134, 323 N.E.2d at 719.

131. *Id.* at 134, 323 N.E.2d at 718.

132. MASS. GEN. LAWS ANN. ch. 150E, § 6 (West 1982).

133. *Id.*

134. *Id.* § 9.

135. *Id.* § 9A.

It is therefore clear that the resulting collective bargaining agreement is a voluntary agreement on the part of the school committee. Thus, the concern that public control over management of government will be subsumed by the collective bargaining agreement is overstated.[136] As the *Dayton* court recognized, school committee discretion, the Massachusetts Supreme Judicial Court's *quid pro quo* for public control,[137] is exercised in the process of agreeing to the collective bargaining agreement.[138] Similarly, concern that reinstatement as a remedy subsumes managerial prerogatives is also overstated; while the parties may agree to binding grievance arbitration, there is no requirement on how broad or narrow the scope of that procedure shall be.[139] Further, the arbitrator called in to en-

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136. *Cf.* Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 912 (1973) ("The desire to avoid illegal delegations of power, as well as the reluctance to permit employee groups to encroach upon areas entrusted to the discretion of a political agency are unquestionably valid, if often overstated, concerns of the court.").

137. *Curry*, 3 Mass. App. at 158, 325 N.E.2d at 287.

138. *See supra* text accompanying note 130.

139. *See* MASS. GEN. LAWS ANN. ch. 150E, § 8 (West 1982). One commentator has suggested that the public employer be more aggressive in negotiating grievance arbitration agreements concerning those matters that are traditionally reserved to management. He suggested that those matters be retained by management through the vehicle of the agreement. Vaccaro, *supra* note 58, at 389-90. "In the private sector employers long since have recognized the importance of reserving, through the vehicle of the management's rights clause, the traditional rights of management. The management rights clause . . . is now becoming essential." *Id.* The management's rights clause may "restrict, by express contractual language the types of matters which may be taken to arbitration." *Id.* at 390.

Vaccaro was responding to the general public sector adoption of the presumption of arbitrability, *see id.* at 389, which provides that a grievance should be allowed to go to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). The presumption of arbitrability was adopted by the United States Supreme Court as a matter of national labor policy. The Court found that if courts were allowed to infer bars to grievance arbitration from vague management's rights clauses "the arbitration clause would be swallowed up by the exception." *Id.* at 584.

In essence, however, it is the non-delegation doctrine that has become the judicially created management's rights clause. *See Curry*, 369 Mass. at 685, 343 N.E.2d at 145. To the extent that the non-delegation doctrine interferes with appropriate enforcement of the collective bargaining agreement, the arbitration clause has been "swallowed up" by the exception.

The Massachusetts courts, however, have demonstrated that the public employer may successfully prevent losing control over certain discretionary decisions by bargaining the appropriate explicit language into the collective bargaining agreement. In School Comm. v. Brown, 375 Mass. 502, 277 N.E.2d 935 (1978), the court prevented arbitration of sabbatical leave, not on delegation grounds, but because the language of the contract clearly reserved such decisions to the school committee. *Id.* at 505, 377 N.E.2d at 937-38.

force the contract is bound by the scope of the issues that the parties have agreed to submit to arbitration.[140] Thus, the matters which may or may not be arbitrated are a result of voluntary agreement, and that agreement is an independent exercise of the school committee's discretion.[141]

Finally, reinstatement *per se* is not unlawful[142] and has been approved by the supreme judicial court as an inherent part of the grievance arbitration agreement[143] unless barred by the non-delegation doctrine.[144] Therefore, to the extent that the public employer agrees to binding arbitration, it has agreed implicitly to the reinstatement remedy. If this agreement is voluntary, then the employer exercised its discretion in that agreement.[145] Under such circumstances, there can be no delegation problem whenever the arbitration process is invoked and reinstatement is afforded as a rem-

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Brown stands as a response to the fear that management will lose control over matters not legislatively required to be bargained into the collective bargaining agreement by demonstrating that much control is left to management's successful bargaining. *See* Vaccaro, *supra* note 58, at 389. See also Summers, *supra* note 2, in which the author states that "[t]he duty to bargain on a subject does not require the public employer to surrender flexibility. . . . As in the private sector, the public employer can bargain for a flexible rule or even for full discretion in regulating the subject during the contract period." *Id.* at 1194 n.71.

140. MASS. GEN. LAWS ANN. ch. 150C, § 2(b)(2) (West 1982).

141. *See* Local 953, Int'l Union of AFSCME v. School Dist., 66 L.R.R.M. (BNA) 2419 (Mich. Cir. Ct. 1967). The court upheld the legality of a binding arbitration provision in a public school teacher contract. In doing so it noted: 1) that the agreement was voluntary and both parties benefitted from it; 2) that the provision for binding arbitration limited the jurisdiction of the arbitrator to the provisions of the contract; and 3) that the arbitrator was chosen jointly by the parties. *Id.* at 2421.

142. *See supra* text accompanying notes 71-72, 78.

143. *See, e.g.*, *Korbut*, 373 Mass. 788, 369 N.E.2d 1148 (1977). There was no discussion in *Korbut* as to whether reinstatement as a remedy was authorized by the collective bargaining agreement; it was assumed by the court that it was. This is consistent with the policy towards arbitration enunciated by the United States Supreme Court in United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), in which Justice Douglas, writing for the majority, stated:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgement to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

Id. at 597. *And see id.* at 598-99. This principle, that an arbitrator should be afforded flexibility in fashioning a remedy—whether or not specifically authorized by the collective bargaining agreement, has been cited with approval by the supreme judicial court in Boston Teachers Union, Local 66 v. School Comm., 370 Mass. 455, 467, 350 N.E.2d 707, 716 (1976).

144. *See, e.g.*, *Raymond*, 369 Mass. at 690, 343 N.E.2d at 148.

145. *See supra* notes 129-36 and accompanying text.

edy.[146] Because the non-delegation doctrine interferes with the arbitration process and renders meaningful enforcement of collective bargaining agreements illusory, it can only be defended on the ground that it is the only way to protect public control over governmental processes. But, because public control is already protected through the collective bargaining process, the doctrine should be abrogated insofar as it bars the reinstatement remedy. By abrogating the non-delegation doctrine to this extent, grievance arbitration will provide more meaningful protection of collective bargaining rights without impeding public control over management of the public schools.[147]

C. *The Effects of the Non-Delegation Doctrine on the Speedy Resolution of Disputes and the Expectations of the Parties to a Collective Bargaining Agreement*

Preventing adequate enforcement of contract rights is not the only problem that the non-delegation doctrine has caused. Meaningful enforcement of contractual rights may be had in the courts. Arbitration, on the other hand, is intended as an alternative that will provide for speedy resolution of differences because it is not subject to the delay and obstruction litigation in the courts normally entails.[148] The scope of the non-delegation doctrine is developed on a case by case basis[149] and the court may, in some cases, employ a balancing test to determine the appropriateness of the arbitration remedy.[150] Therefore, a school committee suffering an adverse arbitration award is encouraged to litigate the award, thus giving the courts, and not the arbitrator, the final say on the merits of the award.[151] The non-delegation doctrine, therefore, undermines the

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146. *See, e.g.*, *Raymond*, 369 Mass. at 690, 343 N.E.2d at 148 (holding that reinstatement by the arbitrator is a delegation of managerial prerogatives); *Dayton*, 41 Ohio St.2d at 134, 323 N.E.2d at 718 (holding that discretion is exercised in the formulation of the contract).

147. Because management control of discretion is exercised at the time the contract is entered, *see supra* text accompanying notes 129-30, 144-45, the degree of public control is the same whether management discretion is exercised through formation of the contract or while the contract is in force. *See supra* note 139.

148. City of Lawrence v. Falzarano, 1980 Mass. Adv. Sh. 571, 581, 402 N.E.2d 1017, 1024 (1980).

149. *Boston Teachers*, 370 Mass. at 464 n.5, 350 N.E.2d at 714-15 n.5.

150. *See supra* notes 66-67 and accompanying text.

151. *See* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). While the courts necessarily have the final say on any arbitration award, *see* MASS. GEN. LAWS ANN. ch. 150C, § 11 (West 1982), excessive post arbitration review

speedy resolution of grievances through arbitration.[152]

Arbitration is also intended to provide for a predictable system of dispute resolution in which the final obligations of the parties will be made clear.[153] But the predictability of exercising one's rights within the context of a public sector collective bargaining agreement has been reduced by the non-delegation doctrine. A recent Massachusetts case makes this point clear. In *School Committee v. Trachtman*,[154] the court allowed the school committee to unilaterally reduce the teaching load of a teacher, for reasons unrelated to educational policy concerning curriculum[155] or teacher competence.[156] Rather, it was to fulfill a "policy" requiring that 5.6 teaching positions be removed from the school committee's budget.[157] Consistent with Massachusetts' decisions allowing cash awards for contract violations,[158] the arbitrator was permitted to award compensation.[159] Though not at issue in the case, it would have been inconsistent with past decisions to allow the arbitrator to reinstate Trachtman.[160]

As a result of the *Trachtman* court's decision, school committees have lost all but theoretical control of their budgets where they have agreed under a collective bargaining agreement to maintain certain teaching positions. If indeed the committee has a non-delegable management right to unilaterally reduce a teacher's workload and salary as part of a policy to remove 5.6 positions from its budget, that right is vitiated by the necessity to pay in the arbitration award what it hoped to save through the budgetary reduction. Thus, the protec-

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can disrupt the arbitration process. Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329, 331 (1980).

152. *See* City of Lawrence v. Falzarano, 1980 Mass. Adv. Sh. 571, 581, 402 N.E.2d 1017, 1024 (1980).

153. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

154. 1981 Mass. App. Ct. Adv. Sh. 541, 417 N.E.2d 459, *aff'd*, 1981 Mass. Adv. Sh. 2399, 429 N.E.2d 703.

155. Compare *Raymond*, 369 Mass. at 690, 343 N.E.2d at 148.

156. Compare *Berkshire Hills*, 375 Mass. at 526-27, 377 N.E.2d at 942 (choice of principal).

157. 1981 Mass. App. Ct. Adv. Sh. at 544, 417 N.E.2d at 461.

158. *See supra* text accompanying notes 35-37.

159. *Trachtman*, 1981 Mass. App. Ct. Adv. Sh. at 2399, 429 N.E.2d at 704.

160. *Raymond*, 369 Mass. at 690, 343 N.E.2d at 148; School Comm. v. Curry, 3 Mass. App. Ct. 151, 157, 325 N.E.2d 282, 286-87 (1975), *aff'd*, 369 Mass. 683, 343 N.E.2d 144 (1976); Berkshire Hills Regional School Dist. Comm. v. Berkshire Educ. Ass'n, 375 Mass. 522, 529, 377 N.E.2d 940, 944-45 (1978). *See New Bedford Educ.*, 9 Mass. App. Ct. at 802, 405 N.E.2d at 168. *Cf. Doherty*, 363 Mass. at 885, 297 N.E.2d at 495 (arbitrator may not supersede school superintendent's discretion by awarding teacher's appointment).

tion of management prerogatives that the doctrine affords in this instance is illusory.

Teacher Trachtman, on the other hand, though wrongfully discharged, was not afforded an adequate remedy either. Compensation must be limited in time,[161] while one's appointment to a particular position may last indefinitely. If the supreme judicial court had not applied the non-delegation doctrine to the foregoing situation, and presuming that the contract had not barred reinstatement as a remedy, the anamolous result in *Trachtman* might not have occurred. If Trachtman had been reinstated shortly after the reduction occurred, his rights would have been protected more fully.[162] The school committee, on the other hand, would have been free to make the reductions of 5.6 teaching positions through the agreed procedure without having to forfeit its intended savings.[163] *Trachtman*, therefore, is yet another example of how the non-delegation doctrine has undercut the ability of grievance arbitration to provide a speedy resolution to public employee disputes while adding to the uncertainty of exercising one's rights within the context of a public sector collective bargaining agreement.

IV. CONCLUSION

Binding grievance arbitration, as provided for by Massachusetts law, is a desirable means of resolving employment disputes arising in the public sector. The effectiveness and efficiency of the grievance arbitration process, however, is frustrated by the non-delegation doctrine.

The non-delegation doctrine requires that certain managerial prerogatives, delegated by the state to subordinate bodies, not be redelegated to third parties. It has been judicially applied in Massachusetts in order to protect management rights and discretion so that public control over public schools will be preserved.

The supreme judicial court has acknowledged the right of public employees to bargain for certain contractual rights. Through application of the non-delegation doctrine, the court has prevented the grievance arbitrator from using the reinstatement remedy to enforce those rights unless the employer's ultimate discretion to discharge freely or deny an appointment to the employee is left unimpaired. Application of the doctrine in this way limits the effectiveness of ar-

161. *See supra* text accompanying notes 43-49.
162. *See supra* text accompanying note 91.
163. *See* 1981 Mass. Adv. Sh. at 2399, 429 N.E.2d at 704.

bitration in protecting contractual rights. By encouraging litigation, the doctrine undermines the ability of the arbitration process to resolve disputes quickly. Further, the doctrine limits the predictability of the public employer and employee's respective rights and obligations with anamolous results on the ability of the public employer to rely on the contract in making managerial decisions.

An arbitration agreement is reached through the voluntary process of collective bargaining. The contents of a final contract, including the scope and applicability of the grievance arbitration agreement, is a manifestation of mutual consent. The extent to which that process may be distorted by collective employee pressure is limited by the Massachusetts prohibition against public employee strikes. Thus, the focus of managerial decision making should be on the collective bargaining agreement and the scope of grievance arbitration should be contained within that agreement.

By focusing on the contract, and by requiring that any limits on remedies available to the arbitrator be contained within that agreement, more effective protection of employee rights is possible. Further, by eliminating ad hoc judicial relief from the constraints of the contract, the agreement to arbitrate will become more meaningful. Litigation as a means to seeking that relief will then be reduced, thereby increasing the speed of resolution through the arbitration process.

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